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March 2, 1964

Mr. Ken Chamberlain, Attorney
Richfield, Utah

Re: A to L Companies

Dear Ken:

I suppose we ought to decide what we are going to do on the decision which approved our exchange application. I am not at all clear what it decided. It apparently permits our clients to use by exchange "only that amount which applicants can prove as stream depletion resulting from current irrigation practices including current consumptive uses and soil storage for later uses. Any water which can not meet this classification is declared to be the water owned by downstream users."

If we have in fact in the past been making this exchange, then it seems to me that this decision approves our right to continue to make it, and as to that situation we are confronted only by a fact question as to what our past practice has been. If we are going to take that matter to court, it should be for a declaratory judgment which would decide the amount of water which we have heretofore utilized by exchange or otherwise under our rights. If we were to succeed in showing that we have heretofore been making the exchange, then the decision is completely in our favor, and we have no reason to appeal it.

If, however, the court should find that we have not been making the exchange in the past, then the decision denies our right to make it in the future, and as to it, I think we should want to appeal, because we interpret the Cox Decree as granting to us the right to store the water and the exchange application would permit us to use this decreed right by exchange.

Thus, if we are going to go to court, it seems to me that our complaint would have to have at least two counts. The first would urge the court to determine what the past practice has been and in particular to adjudicate that we have heretofore used the water by exchange, and that by reason of this approval we have the right to continue to make the exchange exactly as we contend. This would raise only a single fact issue as to past usage.

The second count of the complaint would be really in the alternative--that is, that if the court ruled on the first count that we have not been making the exchange, and, therefore, could not under the approved application use the water as we want to in the future, then we would contend that the State Engineer is in error in his construction of the decree.

The approval of the change application would give us everything we want if the court would find as a matter of fact that we have been making the exchange as we contend that we have.

If, however, the court finds that no exchange has been made in the past, then the decision would deny our right to make it in the future, and under our theory of the matter, this would be erroneous. This is so, because we contend that the Cox Decree gives us the right to store any and all water, and that this storage could be accomplished by building new storage at this time, or it could be done by storing the water under an exchange arrangement, and we contend that we have the right to do this, even if it had never been done in the past. It is this phase of the matter as to which I think an appeal must be taken. If you concur, why don't you start preparing the pleadings.

Best regards.

Very truly yours,

CLYDE, MECHAM & PRATT

By

EWC:ML